

REVISING THE FAA TO PERMIT EXPANDED JUDICIAL REVIEW OF ARBITRATION AWARDS

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I presume that the symposium organizers decided to have a symposium rethinking the Federal Arbitration Act (“FAA”) at least in part because they believe, as I do, that the 1925 Federal Arbitration Act is woefully out of date. Written in a very different time, the FAA, as currently interpreted, enables easy enforcement of parties’ agreements to arbitrate. Yet the FAA drafters failed to anticipate the creativity of parties interested in using arbitration or the changes in economic relations that would prompt such creativity. As a result of this quite understandable failure, courts have had to address a variety of difficult questions including whether party requests for non-traditional treatment of their arbitration awards should be enforced. Not surprisingly, courts responded to party requests in different ways, resulting in a circuit split on the question of whether parties may agree to expand judicial review of arbitration awards. Although I suspect that the current United States Supreme Court will decide this issue in favor of permitting parties to expand judicial review of arbitration awards on the principle that the FAA is pro-party autonomy,¹ I nevertheless think that a legislative solution to the problem would be more efficacious. In addition, addressing the expanded judicial review issue would enable Congress to revisit other problems with the FAA’s judicial review provision, many of which will be pointed out in this Article and have already been discussed in *Arbitration Law in America: A Critical Assessment*.²

This Article, which builds on previous work I have undertaken in this area,³ ultimately recommends that Congress amend the FAA to permit parties to agree to expanded judicial review, so long as the court’s review of the award does not compromise the institutional integrity of the courts. Part I of the Arti-

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¹ The Court intends to provide an answer to this question during the next term. The Court has granted certiorari in *Hall Street Associates v. Mattel, Inc.*, 196 F. App’x 476 (9th Cir. 2006), *cert. granted*, 127 S. Ct. 2875 (2007). The question in *Hall Street* is whether a court should enforce a post-dispute agreement to review an arbitration award for legal errors or to determine whether substantial evidence supports the arbitrator’s factual findings.

² EDWARD BRUNET, RICHARD E. SPEIDEL, JEAN R. STERNLIGHT & STEPHEN J. WARE, *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* (2006) [hereinafter *ARBITRATION LAW IN AMERICA*].

³ See Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 *HASTINGS L.J.* 1199 (2000).

cle will examine the growing phenomenon of increased judicial review provisions in commercial entities' arbitration agreements. Part II will look at increased judicial review provisions from the courts' perspective—breaking down existing case law into the three approaches courts use to address this problem. Part II ultimately concludes that none of these approaches is satisfactory because all rely to some degree or another on interpretations of the 1925 Federal Arbitration Act. Because the Act's drafters never imagined that parties would want *greater* review of arbitration awards than the FAA provides, the FAA does little to answer the problem. Part III considers possible interpretations of the FAA judicial review section (section 10(a)) and concludes that, on balance, an approach that treats the FAA as a set of default rules is more consistent with the FAA's legislative purpose than is an approach that treats section 10 as a mandatory provision that parties may not avoid. Finally, Part IV articulates a test that could be incorporated into the FAA to help resolve this problem while also limiting, albeit in a small way, parties' freedom to agree to whatever kind of judicial review provisions they want.

I. THE GROWTH IN AGREEMENTS TO EXPAND JUDICIAL REVIEW OF ARBITRATION AWARDS

Commercial entities have become interested in greater judicialization of arbitration relatively recently.⁴ By this, I mean that they are including in their arbitration agreements provisions that expand judicial review beyond the limits outlined in FAA section 10(a).⁵ Why commercial entities are doing this is

⁴ See *W. Employers Ins. Co. v. Jefferies & Co.*, 958 F.2d 258, 259 (9th Cir. 1992) (parties agree to permit arbitrator to make findings of fact and conclusions of law); Edward Brunet, *The Core Values of Arbitration*, in *ARBITRATION LAW IN AMERICA*, *supra* note 2, at 3, 6 ("There is evidence that sophisticated, repeat users of arbitration are willing to pay higher transaction costs for a more complicated and judicialized style of arbitration."). Brunet suggests that the National Arbitration Forum's ("NAF") increased prominence as an arbitral service provider is evidence that supports this theory. *Id.* Unlike other providers, NAF advertises and requires that its arbitrators follow the law. *Id.* (citing A.B.A. J., Feb. 2004, at 20) (NAF procedural code advertised to mandate that arbitrators follow the law when rendering decisions); see also Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 *BROOK. L. REV.* 1459, 1460 (1996). Brunet notes elsewhere that companies are more interested in ensuring that an arbitrator correctly applies the law in order to "reduce the risk of an arbitrator deciding the case 'equitably' or arbitrarily." EDWARD BRUNET & CHARLES B. CRAVER, *ALTERNATIVE DISPUTE RESOLUTION: THE ADVOCATE'S PERSPECTIVE* 427 (1997).

⁵ 9 U.S.C. § 10(a) lists four bases upon which a party may challenge an arbitral award:

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a) (2000).

See also *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 30-31 (1st Cir. 2005) (contract provides judicial error as basis for review); *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc. (Kyocera II)*, 341 F.3d 987 (9th Cir. 2003) (en banc); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001); *Syncor Int'l Corp. v. McLeland*, No. 96-2261,

unclear. Perhaps merchants' interest in expanding judicial review of arbitrators' decisions is a response to society's increased skepticism of arbitration.⁶ Or, it may be that merchants no longer have simple commercial disputes that an arbitrator who is primarily an expert in industry customs can decide.⁷ Today, merchants may have purely commercial or purely legal disputes, or a combination of both. If legal questions are at issue, merchants may wish to expand judicial review of arbitration awards because arbitrators are generally considered experts in particular industries but not in the law. In other words, merchants might want to increase the predictability of results where legal issues are pending while still taking advantage of some of arbitration's benefits, such as speed and efficiency.

Yet under the current system of review articulated in FAA section 10(a), parties do not have the power to cabin arbitrator discretion in any meaningful way. Under section 10(a), a court may reverse an arbitral award only under

1997 WL 452245, at *6 (4th Cir. Aug. 11, 1997) (pointing out that parties agreed that arbitration decision would be reviewed for "errors of law"); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993 (5th Cir. 1995); *Westinghouse Elec. Corp. v. N.Y. City Transit Auth.*, 14 F.3d 818, 822 (2d Cir. 1994) (explaining that parties agree to judicial review of arbitral award under "arbitrary and capricious" standard); *New England Utils. v. Hydro-Quebec*, 10 F. Supp. 2d 53, 57 (D. Mass. 1998) (stating that parties agreed to judicial review of arbitral award for errors of law); *S. Wash. Assocs. v. Flanagan*, 859 P.2d 217, 219 (Colo. Ct. App. 1992) (pointing out that parties agree to same standard of review as is used to review findings of fact and conclusions of law by a Colorado District Court).

⁶ Society has grown increasingly suspicious of arbitration as a means for resolving disputes, at least under certain circumstances. Mandatory binding arbitration, particularly of statutory claims, has caused increasing controversy. Much attention has been focused on whether the existing arbitral procedures provide sufficient procedural safeguards to ensure that parties will be able to vindicate their statutory rights effectively. See, e.g., *Commission on the Future of Worker-Management Relations, Report and Recommendations*, Daily Lab. Rep. (BNA) No. 105, at D-34 (June 3, 1994); *EEOC Policy Statement on Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment*, Daily Lab. Rep. (BNA) No. 132, at E-4 (July 10, 1997). Self-regulatory organizations like the NASD and NYSE responded to criticisms of their mandatory arbitration systems by amending their rules to eliminate the requirement that "associated persons" trading on their exchanges had to agree to arbitrate all statutory disputes arising out of their employment. See BUREAU OF NAT'L AFFAIRS, *ALTERNATIVE DISPUTE RESOLUTION REPORT* (Sept. 16, 1998). Of course, employers in the securities industry may still require their employees to agree to arbitrate statutory claims as a condition of employment. *Id.* Bills have also been introduced in Congress to ensure that pre-dispute arbitration agreements of employment discrimination claims would no longer be permissible. See Civil Rights Procedures Protection Act of 1997, S. 63, 105th Cong. (1997).

⁷ See CPR COMM'N ON THE FUTURE OF ARBITRATION, *COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS* 288 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) (stating that changes in corporate philosophy, bad arbitration experiences and/or high stakes may lead a party to seek greater judicial review of arbitration awards); David Rudenstine, *The Impact on the Arbitration Process of Arbitrating Statutory Claims*, in *CONTEMPORARY ISSUES IN LABOR AND EMPLOYMENT LAW: PROCEEDINGS OF NEW YORK UNIVERSITY 46TH ANNUAL NATIONAL CONFERENCE ON LABOR* § 10.6.1, at 260 (Bruno Stein ed., 1994) (stating that as the kinds of issues submitted to arbitrators become more complex, parties' arbitrator selection process may be affected because knowledge of industry norms will no longer be sufficient to justify selection of an arbitrator).

very limited circumstances.⁸ Limited review was initially perceived as a benefit of the arbitral process, enhancing decision-making efficiency as well as insuring that the arbitrator, often an expert in the subject matter of the dispute, was able to render a final decision that a judge, who is ignorant of industry customs, would not disturb.⁹ Today, arbitrators often are not considered experts in the subject matter of the dispute they arbitrate because many disputes involve statutory and legal claims rather than claims that can be resolved by examining industry customs.¹⁰ Moreover, parties are more concerned about arbitrator bias as the subject matter of the disputes submitted to arbitration has changed.¹¹ In addition, parties to modern arbitration often have widely disparate levels of experience with the arbitral process. An institutional party, who chooses arbitration to resolve all disputes, may have an advantage over the party who may utilize the arbitral process only once, and only because his contract with the institutional party requires him to do so.¹² In this situation, the institutional party may develop informal relationships with the arbitrator, creating an incentive for the arbitrator to find in its favor. The “one-shot” party will not have an opportunity to develop similar relations. Thus, realistic concerns about arbitrator bias arise.¹³ Moreover, one-shot players, unlike repeat players,

⁸ 9 U.S.C. § 10(a). In addition to the four statutory grounds set out in section 10(a), many of the federal appeals courts permit challenge to an arbitral award based on one or more of the following grounds: manifest disregard of the law by the arbitrator; the award is arbitrary and capricious; the award violates a clear public policy; the award fails to draw its essence from the parties' contract; and the award is completely irrational. See Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 450-51 (1998) (citing federal appeals court cases).

⁹ Viewed this way, the reluctance of judges to revisit arbitral decisions is not unlike the deference awarded to corporate directors under the business judgment rule. See LEWIS D. SOLOMON, DONALD E. SCHWARTZ, JEFFREY D. BAUMAN & ELLIOT J. WEISS, *CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS* 40 (4th ed. 1998). The common notion underlying each is that a judge should hesitate to substitute his judgment for that of a person more qualified either by expertise or by the fact that the parties chose the alternate decision maker. Similar notions underlie the *Chevron* doctrine in administrative law, which cautions against judicial intervention into agency decisions about statutory meaning. See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984).

¹⁰ *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, Daily Lab. Rep. (BNA) No. 91, at E-11 (May 11, 1995).

¹¹ See Hugh R. McCombs & Jeffrey W. Sarles, *Courts Examine Whether Judicial Review of Arbitration Awards Can Be Expanded by Contract and Whether Federal Agencies Can Agree to Binding Arbitration*, NAT'L L.J., Aug. 19, 1996, at B5 (stating that in securities and franchise cases, customers or franchisees may question the impartiality of the industry arbitrators); *EEOC Policy Statement on Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment*, *supra* note 6.

¹² An individual who has few opportunities to negotiate agreements or litigate claims is a “one-shot” player. Unlike the repeat player, the one-shot player is characterized by a lack of organization and sophistication about negotiating contracts or engaging in private dispute resolution. See Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 452 (1996).

¹³ See *EEOC Policy Statement on Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment*, *supra* note 6 (stating that mandatory arbitration systems are inherently biased against discrimination plaintiffs because the employer obtains a structural advantage as a repeat player against the plaintiff, who is a one-shot player).

care about errors even if those errors are unbiased. Because they will not participate in arbitration multiple times, error costs will not even out over time. Thus, if a one-shot player is risk-averse, it will prefer to avoid the uncertainty inherent in arbitration and prefer a regime that allows more invasive judicial review.

As a result, many parties now believe that the limited review outlined in FAA section 10(a) creates a risk of arbitrary and capricious, or even biased, decision making. Groups interested in reform of the arbitral process often advocate the requirements of written opinions and expanded judicial review of those opinions as means to achieve the fairness they believe is currently missing from the process.¹⁴ This concern, together with the expansion in the kind of disputes that may be submitted to arbitration, may have triggered an increase in parties' desires for more predictability in outcomes that expansive judicial review may achieve.

Still another possibility exists. As commercial transactions grow in size and amount, the disputes that arise from those transactions similarly increase in magnitude. Under the single-tier system of traditional arbitration, parties were not concerned about any single result because results would even out over time (i.e., parties were risk-neutral).¹⁵ As the stakes in a given case become higher, however, merchants who might be risk-neutral with respect to small disputes may become risk-averse and want more predictable results.¹⁶ Thus, the parties' desire to expand judicial review may simply be seen as a way to constrain the uncertainty inherent in a single-tier or limited multi-tier system.

Although there may be good reasons underlying parties' desires to expand judicial review, such agreements are controversial because they demand greater judicial oversight of arbitration than Congress currently provides. Because this Symposium asks us to rethink the FAA, I propose to revise the existing FAA judicial review section to implement a test I developed in a previous article¹⁷—rather than simply reject agreements to expand judicial review, FAA section 10 should be revised to explicitly permit parties to expand judicial review of arbitral awards. The review should not be unlimited however. Expansion of judicial review should only be permissible if the parties' proposed alterations of the standard of review do not threaten the institutional integrity of the courts. Before the new test is proposed, however, I will review the existing case law to better illustrate the current problem.

¹⁴ See Cole, *supra* note 3; *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, *supra* note 10. Others are concerned that expanding judicial review will dramatically undermine the efficiency of the arbitration process and increase arbitration's costs, making the process less attractive to prospective users. CPR COMM'N ON THE FUTURE OF ARBITRATION, *supra* note 7, at 289.

¹⁵ This conclusion assumes unbiased errors in the decision-making process. So long as arbitral errors are unbiased, parties have no cause for alarm over any single decision. See Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 922-23 (1979).

¹⁶ CPR COMM'N ON THE FUTURE OF ARBITRATION, *supra* note 7, at 288.

¹⁷ Cole, *supra* note 3.

II. JUDICIAL ANALYSIS OF PARTIES' ABILITY TO OBTAIN ENFORCEMENT OF CONTRACTS FOR EXPANDED JUDICIAL REVIEW OF ARBITRAL AWARDS

Three different approaches emerge from the case law analyzing parties' ability to agree to expand judicial review of arbitral awards. First, some courts conclude that parties can agree to expanded federal court review of an arbitration award.¹⁸ A second approach, which Judge Kozinski advanced in his original *Kyocera I* concurrence, is a modified freedom of contract approach, permitting parties to expand judicial review of arbitration awards if the court is familiar with the standard of review.¹⁹ A third approach prohibits parties from obtaining enforcement of agreements to expand judicial review.

A. Enforcing Parties' Standards

The first approach takes a broad view of federal jurisdiction. Courts following this approach allow parties to contract for whatever standard of judicial review they desire. In these cases, courts acknowledge no limitations on the parties' ability to ask for, or the court's ability to grant, standards of review different from those listed in the FAA. The courts following this approach require that party requests be made using clear contractual language.²⁰ For example, in *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*,²¹ the parties contracted for federal court review of any arbitral decisions rendered in disputes between them on the basis of "errors of law."²² The Fifth Circuit held that the parties could agree to expand federal judicial review of their arbitration award.²³ The *Gateway* court emphasized that the FAA's judicial review provision was a default rule that parties could contractually avoid.²⁴ Because the court viewed FAA section 10(a) as providing default rules that could be altered by contract, it did not consider whether agreeing to expanded judicial review caused any jurisdictional problems for the federal court required to conduct the review.

¹⁸ See *Hughes Training Inc. v. Cook*, 254 F.3d 588, 590 (5th Cir. 2001) (The parties agreed to have an award reviewed using same standard "as that applied by an appellate court reviewing a decision of a trial court sitting without a jury."); see also *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21 (1st Cir. 2005); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287 (3d Cir. 2001); *Syncor Int'l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245 (4th Cir. Aug. 11, 1997); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993 (5th Cir. 1995); Kristen M. Blankley, *Be More Specific! Can Writing a Detailed Arbitration Agreement Expand Judicial Review Under the Federal Arbitration Act?*, 2 SETON HALL CIRCUIT REV. 391 (2006) (discussing cases).

¹⁹ *LaPine Tech. Corp. v. Kyocera Corp. (Kyocera I)*, 130 F.3d 884 (9th Cir. 1997) (Kozinski, J., concurring).

²⁰ See Richard E. Speidel, *Parties' Power to Vary Standards for Review of International Commercial Arbitration Awards*, 8 NEV. L.J. 314, 315 n.6 (2007).

²¹ *Gateway*, 64 F.3d 993.

²² *Id.* at 996.

²³ Ignoring the parties' agreement, the district court had reviewed the arbitral award using a "harmless error" standard rather than the "errors of law" standard the parties selected. *Id.* at 997. In addition to holding that the parties could choose their own standard of review, the court also held that a court should apply the standard of review the parties selected. *Id.*

²⁴ *Id.* at 996-97.

B. Using Familiar Standards

Judge Kozinski took a more limited approach to this question in *Kyocera I*, concurring in a decision to permit parties to contract for judicial review of arbitral decisions on the basis of errors of law.²⁵ Although the Ninth Circuit, sitting en banc, reversed *Kyocera I*,²⁶ the Kozinski concurrence influenced many commentators and court decisions on this issue between 1998 and 2007.²⁷ As a result, the concurrence is still worth examining.

In his concurrence, Judge Kozinski articulated his concern that the cases allowing parties to decide how their arbitration should be administered did not naturally support a conclusion that the parties can dictate how the courts should review the decision. Judge Kozinski stated, "I do not believe parties may impose on the federal courts burdens and functions that Congress has withheld."²⁸ Responding to this concern, he reached the same conclusion as the majority, reasoning that any case where parties agreed to expand judicial review could have been in federal court absent the existence of the arbitration agreement. Thus, Judge Kozinski concluded, "enforcing the arbitration agreement—even with enhanced judicial review—will consume far fewer judicial resources than if the case were given plenary adjudication."²⁹

²⁵ The *Kyocera* agreement provided in full: "The Court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous." *LaPine Tech. Corp. v. Kyocera Corp. (Kyocera I)*, 130 F.3d 884, 887 (9th Cir. 1997).

²⁶ *Kyocera Corp. v. Prudential-Bache Trade Serv., Inc. (Kyocera II)*, 341 F.3d 987 (9th Cir. 2003) (en banc).

²⁷ See *New England Utils. v. Hydro-Quebec*, 10 F. Supp. 2d 53, 64 (D. Mass. 1998); *Trombetta v. Niren*, GD 04-015418 (Ct. Com. Pl. Allegheny County 2005), printed in 153 PITTSBURGH LEGAL J. 167 (2005); Cole, *supra* note 3; Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429, 429 n.6, 442 n.81 (2004); Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 248 (1997); Stephen J. Ware, "Opt-in" for Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act, 8 AM. REV. INT'L ARB. 263, 266-67 (1997).

²⁸ *Kyocera I*, 130 F.3d at 891 (Kozinski, J., concurring).

²⁹ *Id.* Several state courts have also considered the propriety of allowing parties to contract to expand judicial review of arbitral awards. At least three courts prohibit party enlargement of statutory standards. See *S. Wash. Assocs. v. Flanagan*, 859 P.2d 217, 219 (Colo. Ct. App. 1992); *Chi. Southshore & S. Bend R.R. v. N. Ind. Commuter Transp. Dist.*, 682 N.E.2d 156, 159 (Ill. App. Ct. 1997); *Dick v. Dick*, 534 N.W.2d 185, 191 (Mich. Ct. App. 1995). Four other courts permit parties to expand the standard of review. See *Moncharsh v. Heily & Blase*, 832 P.2d 899, 919 (Cal. 1992); *Primerica Fin. Servs., Inc. v. Wise*, 456 S.E.2d 631, 634 (Ga. Ct. App. 1995); *Tretina Printing, Inc. v. Fitzpatrick & Assocs.*, 640 A.2d 788, 793 (N.J. 1994); *NAB Constr. Corp. v. Metro. Transp. Auth.*, 579 N.Y.S.2d 375, 375 (App. Div. 1992). Like the federal courts, state courts disagree on this issue. A Michigan appellate court found that because a state statute did not authorize the parties to appeal substantive matters following an arbitration, a clause in the parties' contract authorizing an appeal on the ground that the arbitrator made an "[error] of substance" was not enforceable. *Dick*, 534 N.W.2d at 187, 191. Similarly, in *South Washington Associates*, 859 P.2d at 220, a Colorado appellate court held that parties cannot define by contract the power of a court of law. According to the court, the parties' agreement to authorize appellate court review using the same standard as the court would use to review a trial court decision was invalid because the authority to determine jurisdiction of a state appellate court belongs to the legislature rather

Kozinski was also concerned that the work the district court would perform when reviewing an arbitral award was different from the approach it would use if the case had been brought in the court originally. Kozinski ultimately concluded that Kyocera's arbitration agreement should be enforced as written because the different work Kyocera and LaPine requested was identical to that performed by a district court reviewing administrative agency or bankruptcy court decisions. Kozinski speculated that the answer would be different if the parties had selected an unfamiliar standard of review, such as flipping a coin or studying the entrails of a dead fowl.³⁰

C. Prohibiting Enforcement of Agreements to Arbitrate

Three circuits, the Seventh, Ninth, and Tenth, reject parties' attempts to agree to expand judicial review of arbitration awards.³¹ The courts in these circuits take a very narrow view of federal jurisdiction. Rejecting a union's suggestion that the court should set aside the arbitrator's award if it was an "unreasonable interpretation of the contract,"³² the Seventh Circuit in *Chicago Sun-Times* held that the federal court did not have jurisdiction to review cases beyond the limits identified in FAA section 10(a). According to the court, while parties are free to contract for all the private justice they might wish, they cannot contract for judicial review of arbitral awards. In other words, the court stated, "[F]ederal jurisdiction cannot be created by contract."³³

than the parties. *Id.* Interpreting the statute granting it jurisdiction, the court rejected the claim that the "award" of a panel of arbitrators fell within the category of "final judgments" that the legislature authorized the court to hear. *Id.* at 219-20. More generally, the court stated, while parties have the freedom to formulate the arbitral process, the power to "define and prescribe the powers of a court of law" belongs to the legislature alone. *Id.* at 220.

By contrast, a New York appellate court enforced a parties' agreement to allow judicial review to determine if an arbitral award was arbitrary, capricious, or so grossly erroneous as to evidence bad faith. *See NAB Constr. Corp.*, 579 N.Y.S.2d at 375.

³⁰ *Kyocera I*, 130 F.3d at 891 (Kozinski, J., concurring).

³¹ *See Kyocera II*, 341 F.3d 987; *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925 (10th Cir. 2001); *Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991). The Eighth Circuit, while failing to enforce any party agreements to expand judicial review, seems to be more open to the possibility. In *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997 (8th Cir. 1998), the court, in dicta, expressed reservations about the parties' ability to agree to expand judicial review. Recognizing that there is a difference between contracting for arbitral procedures and contracting for an Article III court to review an arbitral decision, the court identified the issue as an "interesting question" of which a resolution was unnecessary. *Id.* at 998. In a subsequent decision, *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 789 (8th Cir. 2003), the Eighth Circuit reiterated its skepticism about parties' ability to expand judicial review but appeared more open to the notion of broader judicial review, stating that parties may be able to enforce expanded judicial review provisions if they "clearly and unmistakably" indicate an "intent to have the district court review de novo the arbitrator's award."

³² *Chi. Sun-Times*, 935 F.2d at 1507.

³³ *Id.* at 1505. The Seventh Circuit, in *IDS Life Insurance Co. v. Royal Alliance Associates*, 266 F.3d 645, 650 (7th Cir. 2001), followed the *Chicago Sun-Times* holding, finding that a plaintiff could attack an arbitration award only on those grounds identified in the FAA. In *IDS*, the plaintiffs claimed that the defendants, securities broker-dealers, tortiously interfered with some of the plaintiffs' employees' contracts. *Id.* at 648. Affirming the district court's decision to enforce the arbitration award, the Seventh Circuit stated that "the grounds for challenging an arbitration award are narrowly limited Within exceedingly broad limits,

The Ninth Circuit, sitting en banc in *Kyocera II*, reached the same conclusion. The court stated that Congress clearly demarcated the limits of judicial review when it enacted the FAA. According to the court, the FAA “afford[s] an extremely limited review authority . . . [that does not] permit unnecessary public intrusion into private arbitration procedures.”³⁴ While parties may agree to have appellate arbitral panels review arbitration decisions, once in the federal court system, the private arbitration process is over and the parties can play no role in instructing a federal court as to how a dispute may be resolved.³⁵ Any other conclusion, the Ninth Circuit emphasized, would allow parties to create federal jurisdiction by contract.³⁶

In sum, a review of the existing case law reveals disagreement about the appropriate method for evaluating parties’ agreements to expand judicial review of arbitral awards. The *Gateway* approach represents a freedom of contract approach—contracts should be honored without regard to questions of limitations on jurisdiction. A second approach, which Kozinski articulates in *Kyocera I*, suggests a compromise—allow parties to contract for standards of review as long as the court is familiar with them. Since the cases could have been in federal court in the absence of the parties’ arbitration agreement, reasons Kozinski, enforcement of familiar standards of review will be efficient and will not violate any important federal jurisdictional principles. A third approach, represented by the *Chicago Sun-Times* case, goes the other direction, prohibiting parties from agreeing to any standard of review not identified in the FAA.

III. WHY THE FAA, AS DRAFTED, FAILS TO RESOLVE THIS ISSUE

The central issue in each of the cases evaluating party requests for expanded judicial review of arbitral awards, not explicitly addressed in any of them, is whether the FAA’s limitations on judicial review are mandatory or default rules.³⁷ In evaluating any novel request for judicial action, the court must first establish that it has statutory authority to grant the request. If FAA section 10(a) establishes a mandatory rule, the parties’ agreement to expand judicial review beyond section 10(a) must be rejected because the court does

the parties to an arbitration agreement choose their method of dispute resolution and are bound by it however bad their choice appears to be either *ex ante* or *ex post*.” *Id.* at 649.

³⁴ *Kyocera II*, 341 F.3d at 998.

³⁵ *Id.* at 1000. According to the court, “a federal court may only review an arbitral decision on the grounds set forth in the Federal Arbitration Act. Private parties have no power to alter or expand those grounds, and any contractual provision purporting to do so is, accordingly, legally unenforceable.” *Id.*

³⁶ *Id.* at 999 (citing *Chi. Sun-Times*, 935 F.2d at 1504-05).

³⁷ Default rules are those statutory and common law principles that govern party behavior unless parties by contract opt out of them. ARBITRATION LAW IN AMERICA, *supra* note 2, at 112-13; Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 706 (1999). Mandatory rules are legislatively created obligations that parties cannot contract around. *Id.* Professor Brunet notes that the split over how to treat agreements to expand judicial review of arbitration awards is an excellent illustration of the “dichotomy” between default and mandatory rules. Edward Brunet, *The Appropriate Role of State Law in the Federal Arbitration System: Choice and Preemption*, in ARBITRATION LAW IN AMERICA, *supra* note 2, at 63, 80.

not have the power to enforce it. If section 10(a) is a default rule, then the court has the authority to enforce the agreement if the agreement does not otherwise require the court to engage in arbitrary and capricious decision making. The principal objective of this section of the Article is to determine whether the FAA limits the judicial review of arbitral awards to the reasons section 10(a) identifies or whether the FAA simply provides a default rule to govern situations where parties do not request more judicial involvement than the existing statute authorizes.

The presumption should be in favor of achieving the social policy objectives of the FAA with default rules if possible because default rules better preserve the concept of freedom of contract by allowing parties to opt out of them in favor of a regime they prefer.³⁸ Moreover, unlike a mandatory rule, a default rule limits the potential loss that may result to “the lesser of two amounts: (1) the cost to parties of contracting back to their desired rule and (2) the cost to parties of living with an undesirable default.”³⁹ If it is determined that the FAA’s judicial review provision is a mandatory rule, by contrast, the potential loss that could result is always the latter, which imposes significant costs on parties who otherwise would have negotiated around the rule.

The *Gateway* court must have concluded that the FAA’s rules are default rules rather than mandatory terms because its decision allowed parties to contract around FAA section 10(a).⁴⁰ To determine whether section 10(a) is a mandatory rule or a default allocation around which parties can contract is a question that should be answered, if possible, primarily by examining the FAA’s language and the congressional intent underlying the drafting of that language.

The standard textualist approach to statutory interpretation assumes that the goal of statutory analysis is to give effect to the expressed intent of Con-

³⁸ See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989); Raymond T. Nimmer, *Services Contracts: The Forgotten Sector of Commercial Law*, 26 LOY. L.A. L. REV. 725, 733 (1993); J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 869. The presumption that default rules are preferable to mandatory rules may be incorrect if there is reason to suspect the validity of parties’ choices. In such a situation, a mandatory rule would be preferable to avoid these mistakes. For example, I have argued elsewhere that employees should not be bound to pre-dispute arbitration agreements that they sign as a condition of employment because they have disparate negotiation incentives (when compared to the employer) and because they systematically underestimate the significance of the provision that they sign. See Cole, *supra* note 12. In the cases where parties agree to expand judicial review of arbitral awards, there is little reason to suspect the validity of the parties’ choices because the parties are both repeat players with significant experience in negotiating such agreements.

³⁹ Verkerke, *supra* note 38, at 869.

⁴⁰ Another possibility exists. Professor Alan Rau suggests that the expanded judicial review question could be treated as an arbitrability question that does not implicate the FAA at all. Alan Scott Rau, “Arbitrability” and Judicial Review: A Brief Rejoinder, 1 J. AM. ARB. 159 (2002). According to Professor Rau, parties should be able to tailor the arbitration process as they wish. Thus, parties should be able to expand judicial review or, for that matter, withhold legal issues from arbitrators entirely because parties can always limit the scope of arbitral issues. *Id.* at 160-61.

gress.⁴¹ To determine what Congress intended, this analysis traditionally starts and ends with the “plain language of the statute.”⁴² Difficulties arise when the statutory language is broad enough to encompass the subject matter of the interpretive question but the statutory language fails to address it. In such situations, courts tend to examine not only the statutory language, but its context and the statute’s structure as well.⁴³ If that examination fails to provide sufficient illumination, courts often resort to the examination of legislative history.⁴⁴ While Congress has not endorsed this method of analysis as a means for elucidating statutory meaning, the idea that the analysis should focus on the text, its context, and the statute’s structure is currently in vogue as it reduces the extent to which judges, using their discretion, become the real “authors of the rule.”⁴⁵

Examining the plain language of the Federal Arbitration Act does not explicitly answer the question of whether the limited review outlined in section 10(a) is the extent of allowable review under the FAA. At first glance, section 10(a) would appear to give a federal court the power to vacate an award only when the arbitrator’s actions jeopardize the procedural fairness of the arbitration.⁴⁶ Yet the section does not require the court to vacate the award even when these bases appear. According to section 10(a), in any of the following “cases,” i.e., where procedural irregularity has occurred, a federal court “may make an order vacating the award upon the application of any party. . . .” The use of the word “may” suggests that the court’s action is not mandatory.

While section 10(a) is not particularly clear on this issue, FAA section 9 contains language supporting the argument that the statutory grounds articulated in section 10(a) are exclusive. According to section 9: “[T]he court must

⁴¹ Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 184-85 (1994); Keene Corp. v. United States, 508 U.S. 200, 212 (1993); Sanchez v. Pac. Powder Co., 147 F.3d 1097, 1099 (9th Cir. 1998) (stating that “[w]hen interpreting a statute, this court looks first to the words that Congress used”); Sarah Rudolph Cole, *Continuation Coverage Under COBRA: A Study in Statutory Interpretation*, 22 J. LEGIS. 195, 210 (1996) (citing a variety of commentators, including Hart and Sacks, that state the starting point for the court in matters of statutory interpretation is to give effect to congressional intent); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) (writing that textualism, which looks to the statutory language as the source of judicial power is “enjoying a renaissance in a number of recent cases”). Textualism is not the only approach to statutory interpretation. *Id.* at 415-41. Because it receives a certain general acceptance among academics and courts, it will be applied to the FAA language.

⁴² Lutheran Hosp. of Ind., Inc. v. Bus. Men’s Assurance Co. of Am., 51 F.3d 1308, 1312 (7th Cir. 1995); see also Brogan v. United States, 522 U.S. 398, 408 (1998); Bennett v. Spear, 520 U.S. 154, 173 (1997) (The “cardinal principle of statutory construction” requires a court to give effect “to every clause and word of a statute.”).

⁴³ See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); see also Herrmann v. Cencom Cable Assocs., Inc., 978 F.2d 978, 983 (7th Cir. 1992).

⁴⁴ See Garcia v. United States, 469 U.S. 70, 75 (1984); Cole, *supra* note 41, at 210.

⁴⁵ Herrmann, 978 F.2d at 982.

⁴⁶ Federal Arbitration Act, 9 U.S.C. § 10(a) (2000). Thomas Carbonneau contends that FAA § 10 does not contemplate review of arbitral awards on the merits. Such a practice, Carbonneau states, may “require the court to engage in a form of review that is otherwise legally impermissible and contravenes the gravamen of the federal policy on arbitration.” THOMAS CARBONNEAU, CASES AND MATERIALS ON COMMERCIAL ARBITRATION 220 (2d ed. 2000).

grant such an order [confirming the award] unless the award is vacated, modified, or corrected as prescribed by sections 10 and 11 of this title.” At least two federal appellate courts interpreted this language to mean that Congress did not want federal courts to conduct *de novo* review of arbitral awards on their merits; rather, it “commanded that when the exceptions do not apply, a federal court has no choice but to confirm.”⁴⁷

The identification of only four bases for vacatur in the FAA, all of which allow vacating an award only where procedural irregularities appear, also suggests that the drafters of the FAA were concerned exclusively with ensuring the procedural regularity of the arbitral decision-making process, rather than guaranteeing that the arbitral decision is correct on the merits.⁴⁸ While the statutory criteria outlined in section 10(a) appear to focus primarily on preventing inappropriate arbitrator conduct rather than on ensuring that the underlying decision is correct, courts and commentators have offered broader readings of the section.

For example, one commentator explained that it may be possible to use section 10(a)(4) to challenge an arbitration award on the ground that the award is inconsistent with mandatory law.⁴⁹ Professor Stephen Ware articulated an argument that section 10(a)(4), which permits reversal of arbitral awards because the arbitrator exceeded his authority, authorizes courts to vacate awards if the arbitrators exceed their powers *because* arbitrators “do not have the power to decide disputes without applying mandatory law.”⁵⁰ Ware emphasized that there is a “substantial debate” about the extent to which the FAA either requires or permits “courts to review arbitrators’ legal rulings.”⁵¹ Courts have not extended section 10(a)(4) to permit substantive review of an arbitrator’s legal rulings; at the present time, 10(a)(4) has only been applied to cases where the arbitrator has decided an issue not properly before her or where she directed a remedy that was not within her power to order. Thus, to this

⁴⁷ *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 997 (8th Cir. 1998). The *UHC* court concluded that, in light of the FAA’s language, it is not clear that the *Kyocera I* decision was correct. The court stated that “we do not believe it is yet a foregone conclusion that parties may effectively agree to compel a federal court to cast aside sections 9, 10, and 11 of the FAA.” *Id.* The *UHC* court did not have to rule on the issue, however, because the parties had not clearly stated that they wanted to depart from the statutory review standard. *Id.* at 998. In *Kyocera II*, the en banc Ninth Circuit concluded that FAA sections 9, 10, & 11, when considered together, permit very limited review of the underlying arbitration award. *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc. (Kyocera II)*, 341 F.3d 987, 997-98 (9th Cir. 2003).

⁴⁸ That may be because ensuring that arbitrators were correct on the law was the parties’ job. According to one author, writing at the time the FAA was enacted, “[i]n all states, if the parties provide in their arbitration agreement that the arbitrators must decide according to law, the courts will hold the arbitrators to that agreement and will review their law on appeal.” Philip G. Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 603 (1934). The author concedes, however, that the parties’ language must be explicit that the arbitrators should follow the law. *Id.* at 603-04.

⁴⁹ See Ware, *supra* note 37, at 737.

⁵⁰ *Id.*

⁵¹ *Id.* at 737-38.

point, section 10(a)(4) has only peripherally applied to the merits of the underlying case.⁵²

Professor Edward Brunet argued that the language in FAA section 10(a)(3) may contemplate a merit-based review of arbitral awards.⁵³ According to Brunet, Congress may have intended section 10(a)(3) to allow reversal of an arbitrator's award when the arbitrator's misbehavior prejudices or denies the "rights" of any party.⁵⁴ Under Brunet's reading, section 10(a)(3) would allow the court to reverse an arbitral award for an error of law that resulted in a denial of rights. While courts have never read section 10(a)(3) this broadly, as Brunet acknowledged, it certainly raises the question whether the provision should be more broadly construed.

Although the language of section 10(a), when read in the context provided by section 9, would seem to establish that the FAA provides the exhaustive list of reasons for reversal of an arbitral award, it is difficult to conclude confidently that this is the case. The analysis of the section suggests three possible outcomes: (1) that Congress intended to allow federal courts great freedom in deciding whether and when to vacate an arbitral award; (2) that Congress wanted to limit the bases for vacatur to those listed in section 10(a); or (3) Congress did not contemplate parties requesting greater judicial review than section 10(a) provides. For the reasons following, the most likely explanation is the third one.

Section 10(a) is not a significant departure from common law or state statutory arbitration as it existed prior to the FAA's passage.⁵⁵ According to Professor Ian MacNeil, the adoption of section 10 was, for practical reasons, an unnecessary step as the existing common law already limited the bases upon which a court could vacate an arbitral award.⁵⁶ In fact, the 1921 draft of the FAA did not include any provisions governing judicial review of arbitral awards.⁵⁷ This is not surprising because the 1921 draft mirrored the 1920 New York arbitration law, which also failed to include any provisions dealing with the process for reviewing awards.⁵⁸

Thus, it would seem likely that the FAA drafters were simply attempting to codify what they perceived to be the existing consensus regarding judicial review of arbitral awards—that review should be limited to reversal on procedural irregularity grounds. It is quite probable that the drafters simply did not

⁵² *Id.* While this is a much broader reading of the section than the courts have suggested is appropriate, it raises the question whether section 10(a)(4) is subject to more than one construction. Brunet states that section 10(a)(4) may permit substantive review of an arbitration award if the parties have agreed that, for example, the arbitrator should apply the substantive law of a particular state. Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 73 (1999). According to Professor Brunet, meaningful judicial review, when parties have agreed to it, is supported by section 10(a)(4). *Id.*

⁵³ BRUNET & CRAVER, *supra* note 4, at 411-12.

⁵⁴ *Id.*

⁵⁵ IAN MACNEIL, *AMERICAN ARBITRATION LAW* 103-04 (1992). Although American courts' and legislatures' treatment of arbitral awards was not consistent, for the most part, courts and legislatures provided only limited judicial review of arbitral awards even where the arbitrator had ruled on issues of law.

⁵⁶ *Id.* at 104.

⁵⁷ *Id.* at 86.

⁵⁸ *Id.*

contemplate that parties would ever be interested in expanding judicial review of arbitration awards.⁵⁹ Nothing in the legislative history jeopardizes this assumption. In fact, the legislative history focuses almost entirely on the critical issue that the FAA was passed to address: the enforceability of pre-dispute arbitration agreements.⁶⁰ The Supreme Court's examination of the FAA's legislative history supports the notion that Congress passed the FAA primarily in order to ensure that parties' pre-dispute agreements to arbitrate would be enforced.⁶¹ The absence of discussion of judicial review in the legislative history suggests that the drafters intended to codify the common law, which limited review to examination of the arbitral award for procedural irregularities.⁶²

Because the FAA's language and its legislative history are inconclusive on the issue of expanding statutory grounds for vacatur beyond the reasons articulated in section 10(a), examination of the judicial treatment of the four bases for vacatur listed in section 10(a) may help to eliminate the ambiguity.

Some appellate courts have held that section 10(a) establishes the exclusive grounds for vacating commercial arbitration awards.⁶³ Yet most other appellate courts have vacated arbitral awards on grounds not articulated in section 10(a).⁶⁴ According to the latter courts, the acceptable nonstatutory grounds for vacatur include that the award was in manifest disregard of the law, completely irrational, in direct conflict with public policy, arbitrary and capricious, or failed to draw its essence from the parties' underlying contract.⁶⁵

Courts have accepted the "manifest disregard of the law" standard for vacatur more frequently than the other nonstatutory grounds for vacatur of arbi-

⁵⁹ Alternatively, the drafters may have believed that parties who wanted arbitrators to follow the law would contract for that result. At the time the FAA was enacted, courts routinely enforced such agreements. Phillips, *supra* note 48, at 603 (citing numerous state cases).

⁶⁰ See MACNEIL, *supra* note 55, at 100-01.

⁶¹ See *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217, 220 (1985) (ruling that agreement to arbitrate is enforceable even when pleaded together with nonarbitrable claims in a complaint).

⁶² But perhaps they believed that state law would deal with this issue. See Phillips, *supra* note 48, at 603 (reporting that at the time Congress enacted the FAA, state courts reviewed arbitration awards to ensure consistency with the law if parties explicitly requested such review).

⁶³ See *R.M. Perez & Assocs. v. Welch*, 960 F.2d 534, 539-40 (5th Cir. 1992); *O.R. Sec., Inc. v. Prof'l Planning Assocs.*, 857 F.2d 742, 746 (11th Cir. 1988); see also Brad A. Galbraith, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 IND. L. REV. 241, 248 n.53 (1993).

⁶⁴ *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997); *Prudential-Bache Sec., Inc. v. Tanner*, 72 F.3d 234, 239 (1st Cir. 1995). But see *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 n.2 (5th Cir. 1993) (rejecting any nonstatutory grounds for vacating arbitration awards).

⁶⁵ Five federal courts of appeals, the Second, Third, Tenth, Eleventh, and D.C. Circuits have recognized one or more of these nonstatutory grounds for vacatur. See Hayford, *supra* note 8, at 463. Five other federal courts of appeals, the Fifth, Sixth, Seventh, Eighth, and Ninth Circuits, however, have stated their positions much less clearly. *Id.* at 463-64. At times, cases from the circuits indicate a desire to limit review to the statutory grounds, asserting that section 10(a) establishes the "exclusive grounds" for vacating arbitration awards; at other times, as Professor Hayford notes, each of these courts has issued decisions granting vacatur on one of the nonstatutory vacatur grounds. *Id.*

tral awards.⁶⁶ This basis for appealing an arbitral award emerged from the dictum of a 1953 Supreme Court decision, *Wilko v. Swan*.⁶⁷ In *Wilko*, the Court said:

While it may be true . . . that a failure of the arbitrators to decide in accordance with the provisions of the [applicable law] would "constitute grounds for vacating the award pursuant to section 10[a] of the Federal Arbitration Act," that failure would need to be made clearly to appear. In unrestricted submissions [to arbitration] . . . the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.⁶⁸

Many appellate courts have construed *Wilko* as adding a nonstatutory ground to the already existing grounds for vacatur listed in section 10(a). This position is controversial for several reasons. First, the *Wilko* Court may not have intended to add a "nonstatutory" ground to the existing grounds for vacatur. The Court stated that the arbitrator's manifest disregard of existing law constitutes "grounds for vacating the award pursuant to section 10 of the Federal Arbitration Act."⁶⁹ The Court may simply have been interpreting the statutory grounds listed in section 10(a) to permit review of awards when an arbitrator manifestly disregarded the law, i.e., knew what the law was and ignored it. Certainly, section 10(a)(4), allowing vacatur where the arbitrator exceeds his powers, could fit within its purview situations where the arbitrator ignores existing law.⁷⁰ Other federal courts adopt this interpretation of *Wilko*, holding that the "manifest disregard" standard is derived from, rather than independent of, section 10(a).⁷¹

Moreover, the dictum establishing the "manifest disregard" standard may not be good law. At the time the Court decided *Wilko*, it was extremely suspi-

⁶⁶ *Id.* at 465. Only the Fourth Circuit has consistently rejected parties' attempts to avoid arbitral awards on nonstatutory grounds. *Remmey v. PaineWebber, Inc.*, 32 F.3d 143 (4th Cir. 1994). When Congress enacted the FAA, the court stated, it intended to limit the grounds for vacatur to the four listed in section 10(a) of the FAA. *Id.* at 146. According to the *Remmey* court, "[t]he statutory grounds for vacatur permit challenges on sufficiently improper conduct in the course of the proceedings; they do not permit rejection of an arbitral award based on disagreement with the particular result the arbitrators reached." *Id.* Both the Eighth and Eleventh Circuits have declined to adopt the "manifest disregard" standard, although they have not expressly rejected it. *Ainsworth v. Skurnick*, 960 F.2d 939, 940-41 (11th Cir. 1992) (per curiam); *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 750 (8th Cir. 1986). Three circuits have criticized the standard. *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994); *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1412-13 (11th Cir. 1990); *I/S Stavborg v. Nat'l Metal Converters, Inc.*, 500 F.2d 424, 430-31 (2d Cir. 1974).

⁶⁷ *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled on other grounds by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989).

⁶⁸ *Wilko*, 346 U.S. at 436-37 (footnote omitted).

⁶⁹ *Id.* at 436 (emphasis added).

⁷⁰ Although the Court has mentioned the manifest disregard standard in three other opinions, it has never clarified the relationship between the "manifest disregard" standard and section 10. Thus, it is open to interpretation as to the meaning underlying the Court's dictum in *Wilko*. Other commentators raise the issue whether the *Wilko* dictum may have been intended merely to "illustrate an instance which would fall within the scope of the Federal Arbitration Act's provisions for vacating an arbitration award," rather than creating an independent statutory ground for vacatur. Galbraith, *supra* note 63, at 257.

⁷¹ *Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631, 633-34 (10th Cir. 1988); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986).

cious of arbitration as a means to resolve statutory claims. The Court has long since abandoned that suspicion and overruled *Wilko* on the ground that statutory claims are appropriate subjects of arbitration. In light of the changed judicial attitude toward arbitration, one wonders whether the Supreme Court's 1953 position that awards could be overturned for manifest disregard of the law would still be the Court's view today.⁷²

Similar difficulties are apparent when the other nonstatutory grounds are examined. The remaining nonstatutory grounds are inconsistent with the plain language of section 10(a) of the FAA because they contemplate a substantive review of the underlying arbitral award. Moreover, the Supreme Court has not recognized any of these nonstatutory grounds as additional bases for vacating arbitral awards. Finally, unlike the "manifest disregard" standard, none of the remaining nonstatutory grounds have reached any level of acceptance among the federal appellate courts. In light of this lack of consensus and inconsistency with FAA intent, the remaining nonstatutory grounds do little to undermine the argument that the FAA's standards for judicial review are mandatory rules.

An examination of the FAA's statutory language, its legislative history, and subsequent judicial interpretation of its language does not clearly indicate that the FAA's review provisions are either mandatory or default rules. As courts and commentators have repeatedly suggested, section 10(a)'s language is susceptible to more than one interpretation. An interpretation that would permit courts to grant parties' requests for greater review of arbitral awards would be consistent with a permissible interpretation of the language of section 10(a) and the purpose underlying the FAA. Although the opposite conclusion is also an acceptable interpretation, given the importance of freedom of contract and the presumption in favor of finding that the FAA creates default rules rather than mandatory ones, a conclusion that the FAA authorizes courts to grant party requests would seem the better result.

IV. REWRITING FEDERAL ARBITRATION ACT SECTION 10

Although I recommend that courts find that the FAA creates default rules around which parties may contract, a better solution would be for Congress to reconsider the FAA's judicial review provision and directly address the question whether party agreements to expand judicial review of arbitration awards are enforceable. In *Arbitration Law in America*, Professor Ed Brunet offers a proposed revision of section 10. He would add a new section 10(a)(7) that states, "*Party Authority to Enhance Review*: The parties may contract for judicial review of the arbitration award for reasons beyond the grounds set forth in

⁷² The U.S. Supreme Court may eventually answer this question but recently turned down an opportunity to do so. See *Patten v. Signator Ins. Agency, Inc.*, 441 F.3d 230 (4th Cir.), cert. denied, 127 S. Ct. 434 (2006); see also *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994) (The court stated that the *Wilko* "formula reflects precisely that mistrust of arbitration for which the Court in its two *Shearson/American* opinions criticized *Wilko*. We can understand neither the need for the formula nor the role that it plays in judicial review of arbitration [awards] (we suspect none—that it is just words). If it is meant to smuggle review for clear error in by the back door, it is inconsistent with the entire modern law of arbitration.").

this act.”⁷³ This simple statement seems to codify the Fifth Circuit’s ruling in *Gateway*. Professor Brunet would empower parties to ask for any kind of judicial review they wish.

Professor Ware’s solution is similar. According to Professor Ware, party agreements to expand judicial review of arbitration awards should be enforced to “advance . . . the principle that arbitration agreements should be enforced” just like any other contract.⁷⁴ Thus, a revised FAA should tell courts to enforce party agreements to expand judicial review as long as doing so would enforce the agreement submitting the case to arbitration.⁷⁵

I generally agree with Brunet and Ware that parties should be able to agree to what they wish and that the FAA was written to ensure that arbitration agreements are to be enforced like any other contract. I part company from Professors Brunet and Ware, however, and side with Judge Kozinski because I believe that there are some party requests that courts, as institutions, should not be able to grant. Thus, I propose a different provision that could be added to section 10—parties should be able to expand judicial review, but only if that review would not require the court to act in a way that damages the institutional integrity of the court. A new provision in FAA section 10 might read:

§ 10(a)(7) The parties may contract for judicial review of the arbitration award for reasons beyond the grounds set forth in this act provided that the reviewing court finds that the parties’ agreement does not require the court to act in an arbitrary or capricious manner in reviewing the underlying arbitration award.

The final section of this article will address the importance of the integrity review and how it would work in the arbitration context.

V. WHEN DO PARTIES’ REQUESTS FOR EXPANDED JUDICIAL REVIEW OF ARBITRAL AWARDS THREATEN INSTITUTIONAL INTEGRITY?

Under this proposed language, courts cannot enforce party agreements that threaten the institutional integrity of the court. As we have seen, in cases like *Gateway*, parties ask the courts to review arbitral awards utilizing standards such as “errors of law.” Citing party autonomy and freedom of contract, courts often quickly approve the use of this standard and others, applying them to review arbitral awards. In so doing, the courts evaluating these requests have virtually ignored the threat the use of such standards poses to institutional integrity.⁷⁶ Systematic application of an institutional integrity standard to par-

⁷³ ARBITRATION LAW IN AMERICA, *supra* note 2, app. D, at 377.

⁷⁴ Stephen J. Ware, *Interstate Arbitration: Chapter 1 of the Federal Arbitration Act*, in ARBITRATION LAW IN AMERICA, *supra* note 2, at 88, 107.

⁷⁵ *Id.* at 107-08. Professor Ware’s proposed language states that a court shall vacate an award where vacating the award “would enforce the agreement submitting the controversy to arbitration.” ARBITRATION LAW IN AMERICA, *supra* note 2, app. A, at 349.

⁷⁶ While the majority opinions in these cases reflect little concern for the courts’ integrity, Judge Kozinski’s concurrence in *Kyocera I* suggests that, for him, concerns about the court’s integrity are relevant to the discussion. *Lapine Tech. Corp. v. Kyocera Corp. (Kyocera I)*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring). Kozinski’s comment that his decision might be different if the parties had asked the court to “review the award by flipping a coin or studying the entrails of a dead fowl,” shows a recognition that freedom of contract must yield in those cases where the integrity of the courts as an institution is threatened. *Id.*

ties' requests would force courts to evaluate carefully whether adoption of the parties' proposed standard for reviewing the arbitral award would undermine the court's integrity. Using an integrity review, a court could easily reject a proposed standard that would require the court to review the underlying arbitral award by flipping a coin or studying the entrails of a dead fowl. Moreover, application of such a standard would ensure that courts evaluate properly requests that might appear, at first glance, not to threaten the court's integrity.

In the arbitral context, as we have seen, courts have upheld parties' request for application of the "errors of law" or "unsupported by substantial evidence" standards. While these standards might not appear to threaten the court's integrity because courts review all kinds of decisions for legal errors and factual insufficiency, they are nevertheless problematic because the standards prompt the court to review the underlying award even in the absence of a record or written opinion from the proceedings before the arbitrator.⁷⁷ A court's rubber stamp of the underlying decision in the absence of a record when the parties' chosen standard anticipates a more meaningful review may undermine institutional integrity because it makes the court appear to be an unprincipled decision maker.

When such a case presents itself, how might a court go about engaging in an integrity review? Perhaps an analogy to administrative law would be helpful because courts routinely review administrative agencies' informal adjudications.⁷⁸ Like arbitrations, informal agency adjudications resolve disputes between two parties. When a court reviews an informal agency decision, it considers whether the agency's decision was arbitrary or capricious. A decision is rejected as arbitrary and capricious if the agency offered an explanation for its decision that contradicts the evidence that was before the agency at the time of the decision or failed to supply a reasoned analysis supporting its decision.⁷⁹ In other words, application of an arbitrary and capricious standard performs the function of assuring sufficient factual support for a decision.⁸⁰ By applying the arbitrary and capricious rule, courts attempt to strike a balance between excessive judicial intervention in agency decision making, on the one hand, and abdication of traditional control over judicial power on the other.⁸¹

⁷⁷ In modern arbitration, it is unusual for parties to maintain a record of their arbitral hearing or for an arbitrator to write an opinion. Thus, when the parties request judicial review of the arbitral award, there is little for a court to review. When a court reviewed arbitral awards for procedural irregularities alone, the lack of a record or opinion was not viewed as problematic. As Stephen Hayford notes, commercial arbitrators rarely set forth the reasons underlying their decisions in a written opinion. Hayford, *supra* note 8, at 444-45. Nevertheless, courts have routinely applied the FAA's four bases for vacatur. *Id.* at 452-53.

⁷⁸ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that in absence of reasoned analysis, change in agency policy rejected as arbitrary and capricious); *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971) (stating that agency decision reviewed under arbitrary and capricious standard).

⁷⁹ *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. In the agency context, the court will also consider whether the agency has relied on factors that Congress did not intend it to consider or failed to consider factors that it should have considered. *Id.*

⁸⁰ *Ass'n of Data Processing Serv. Orgs. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984).

⁸¹ See *Morse v. Stanley*, 732 F.2d 1139, 1145 (2d Cir. 1984) (stating that the application of the arbitrary and capricious rule to ERISA disputes strikes the appropriate balance between

As in administrative law, application of an arbitrary and capricious standard to evaluate party requests for expanded judicial review of arbitral awards requires a court to ensure that it is capable of reviewing the underlying decision using the standard the parties propose. If a court is unable to apply the parties' standard because there is no record to which it may apply the standard, the court would reject the standard as requiring the court to engage in arbitrary and capricious decision making and dismiss the case.⁸²

Of course, adoption of "arbitrary and capricious" as the standard for reviewing parties' requests is not a panacea. Unlike administrative law, where the administrative agency is a party to the proceeding in front of the district court and is therefore subject to the court's orders, in arbitration, the court cannot order the arbitrator to do anything because the arbitrator is not a party to the enforcement action, only the parties to the arbitration are. Because the court has no power to order the arbitrator to do anything, the court has no power to remand the case to the arbitrator for development of a record or drafting of an opinion.

The answer, then, is for the court to reject the parties' request for expanded judicial review if the court would be required to engage in arbitrary and capricious action. Then the parties, if they choose, can commission the arbitrator to write an opinion or, in their next agreement, agree to maintain a record of the arbitral proceedings.⁸³

VI. CONCLUSION

Federal Arbitration Act section 10, as it is currently configured, fails to address a growing issue in the commercial marketplace—parties who wish to have greater review of their arbitration award than the FAA provides. The raging debate about whether section 10 contains mandatory or default rules has yet to be resolved.⁸⁴ In fact, the federal circuit courts are evenly split on the issue. Although I believe a convincing case can be made that FAA section 10

the need for judicial control of fiduciaries' actions with the need to avoid excessive judicial intervention in the discharge of trustees' discretionary duties).

⁸² In reviewing arbitral awards based on a standard the parties' propose, courts would utilize the arbitrary and capricious standard somewhat differently than would courts reviewing agency decisions. Rather than ensuring that the agency has not acted arbitrarily and capriciously, in the case of arbitral award review, the court is ensuring that application of the parties' standard does not require the *court* to act arbitrarily and capriciously. Despite this difference, the administrative law analogy seems helpful in that, in both administrative law and elsewhere, the court's concern is to ensure that arbitrary and capricious decision making is not tolerated.

⁸³ Unlike early state habeas corpus cases where a state trial court's failure to maintain a record did not preclude substantive review, in the arbitral context, there is typically little in the manner of pleadings or discovery to review. Thus, a record or opinion requirement is essential because, without such a requirement, the court would have nothing to which they could apply the parties' proposed standard of review.

⁸⁴ Resolution may not be far off, however. The Supreme Court agreed to hear the case of *Hall Street Assocs. v. Mattel*, 196 F. App'x 476 (9th Cir. 2006), *cert. granted*, 127 S. Ct. 2875 (2007). This case squarely presents the question whether parties may agree to expand judicial review of an arbitration award on grounds other than those listed in the Federal Arbitration Act.

contains default rules that parties may contract around, perhaps a better solution would be for Congress to overhaul the Federal Arbitration Act. If Congress were to take on this task, revision of section 10 to permit parties to expand judicial review of arbitration awards would be a sensible change. Although this result promotes efficiency and party autonomy, in our constitutional system efficiency should not be achieved at the expense of rights. Thus, in evaluating parties' agreements to expand judicial review of arbitration awards, courts should ask questions about the impact of expanded review on the institutional integrity of the courts. This Article proposes that Congress adopt an approach that allows courts to root out those requests that might damage society's perception of the courts as principled decision makers. Such an approach will likely provide adequate protection for the courts' status as an institution.

While adoption of this test is unlikely to change the outcome of many court decisions, it would ensure the protection of the courts' institutional integrity through application of an arbitrary and capricious review. Already utilized routinely in administrative law to review agency decisions to ensure adequate factual support, an arbitrary and capricious review would allow a court to reject those party requests that might not initially appear to threaten the court's integrity but actually do, such as requests for intensive review of an underlying decision where no record of the decision was kept.

This review process acknowledges that courts are not puppets that litigants may manipulate as they wish. Courts do and should continue to do what is possible, given their limited authority, to grant party requests. After all, freedom of contract is an essential precept in our judicial system. Yet courts must refrain from granting requests that they do not have authority to grant. Moreover, courts must preserve their integrity as institutions by rejecting those requests that would diminish their stature in the public's eyes.

For arbitration, this means that parties' requests for expanded review of arbitral awards should be approved so long as they do not require arbitrary and capricious decision making by the court. While application of this test may allow the errors of law standard to pass muster,⁸⁵ any request that the court review the arbitral award by a flip of a coin or by studying the entrails of a dead fowl must be rejected.

⁸⁵ The errors of law standard is only acceptable if the parties have also agreed that the arbitrator would write an opinion explaining his factual findings and legal conclusions.